

July 3, 2002

Mr. Ron Shawgo  
Assistant Metro Editor  
The Journal Gazette  
600 W. Main Street  
Fort Wayne, IN 46802

Re: *Advisory Opinion 02-FC-22*;  
Alleged Denial of Access to Public Records by the Allen Superior Court, Family Relations  
Division.

Dear Mr. Shawgo:

This is in response to your formal complaint, which was received on June 11, 2002. You have alleged that the Allen Superior Court ("Court") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3, by failing to produce copies of actual employee personnel file records in response to your public records request. Mr. James P. Posey, attorney for the Court, responded to your complaint and a copy of his response is enclosed for your reference.

For the reasons stated below, it is my opinion that the Court has discretion over the disclosure of personnel file records and the failure to provide you with copies of actual personnel file records did not violate the APRA. The Court complied with the APRA by providing you with information from these files in digest form. With respect to the information that was provided to you in response to your request, the Court complied with the APRA so long as you were provided with specific information concerning the status of pending formal charges or final disciplinary actions taken against the Wood Youth Center ("WYC") employees in question.

#### BACKGROUND

According to your complaint, Mr. Michael Gruss, staff writer for your newspaper made a written request to the Court on April 17, 2002 to "inspect and copy . . . the personnel records for the WYC from 1997 to present." You received a response dated April 18th from Mr. Posey indicating that under Indiana Code section 5-14-3-4(b)(8), requests for personnel file information must specify the names of the employees in question, rather than a generalized request for all such records. In response, Mr. Gruss contacted Mr. Posey by letter on April 22, 2002 and provided the names of several WYC employees. On April 23rd, Mr. Posey sent a letter to Mr. Gruss informing him that it would take approximately three (3) weeks to produce the requested information, or on or about May 14th, and that there would be no charge for providing the information to you.

On May 17, 2002, the newspaper received a computer printout compiled by Court staff for each of

the persons named in Mr. Gruss' April 22nd letter. There were no copies of actual personnel file documents provided only summaries of the information that had been produced to respond to the request. On May 21st, you wrote a letter to Mr. Posey reasserting the newspaper's request was to "inspect or copy" these personnel file records, not for a digest of information to fulfill the request. Mr. Posey responded on May 22nd asserting that the information provided does comply with the APRA and that the Court is not required to produce the personnel file records since they have already produced the disclosable information within those records. You then filed your formal complaint with this Office.

In response to your complaint, Mr. Posey stated that under Indiana Code section 5-14-3-4(b)(8), the Court was only required to provide you with information listed at (A), (B) and (C) and not with the actual personnel records. As such, the information provided to your newspaper in response to the request for personnel file records on the several employees of the WYC does comply with the APRA.

### ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

The Court is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Public records are defined under the APRA to include any writing that is received or maintained by a public agency. Id. Any person is entitled to inspect and copy public records concerning the Court's business unless the records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code §5-14-3-3(a). Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . .

'[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions.'

*Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted] quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted]. The Indiana Court of Appeals has also held that "although the exceptions should be construed strictly, this does not mean that expressed exceptions specified by the legislature are to be

contravened." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E. 826, 828 (Ind. App. 1987) [Citations omitted.]

"Public records" are defined under Indiana Code section 5-14-3-2 as "any writing, paper, report . . . that is created, received, retained, maintained, used or filed by or with a public agency." Personnel files are clearly "public records" of a public agency. A public agency, therefore, has the obligation to permit access to inspect or copy personnel files unless the records are excepted from disclosure by statute.

The Court has cited to the exception provided at Indiana Code section 5-14-3-4(b)(8) as the basis for its denial to inspect and copy the personnel file records you requested. Under this statutory exception, the General Assembly has provided public agencies with discretion over the disclosure of personnel file records for public employees in spite of the general rule of the APRA that public records are to be open to inspection and copying under Indiana Code section 5-14-3-3(a). A public agency may exercise its discretion to disclose these records or not to disclose them, so long as the agency is consistent in exercising such discretion.<sup>1</sup> As a threshold matter, therefore, it is my opinion that the Court does have discretion over the disclosure of these public records and the failure to permit you access to them is not a violation of the APRA.<sup>2</sup>

The analysis of this exception, however, does not end with this conclusion. Unlike other discretionary exceptions that permit the public agency complete discretion over disclosure of certain categories of public records, the General Assembly has provided an "exception within the exception" with respect to Indiana Code section 5-14-3-4(b)(8). Under Indiana Code section 5-14-3-4(b), public agencies are required to provide, upon request, the following from personnel files:

- A. The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first or last employment of present or former officers or employees of the agency;
- B. Information relating to the status of any formal charges against the employee; and
- C. Information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

Indiana Code §5-14-3-4(b)(8).

As noted in Mr. Posey's response, the items listed under Indiana Code section 5-14-3-4(b)(8)(A-C) are not "public records" in and of themselves, but are "information" that may be contained in public records that are typically maintained in public employees' personnel files.

In your complaint, it is apparent that there is no debate concerning the items listed under Indiana Code section 5-14-3-4(b)(8)(A), but more so with what is the "information" that is required to be provided to you under (B) and (C) of that provision. You point to one example in your complaint of information that was provided in digest form that did not disclose why a particular employee was reprimanded for using profanity and what "conduct unbecoming an employee" he committed. The question is whether the Court supplied the information that must be produced upon request under

Indiana Code sections 5-14-3-4(b)(8)(B) and (C).

Unlike "public records," the term "information" is not defined in the APRA. Since there is no case law on this subject, we must, as a court reviewing this term would do, apply the rules of statutory construction to determine its meaning.

(U)ndefined words and phrases in a statute must be given their plain, ordinary and usual meaning. Words and phrases in a statute are given their plain and ordinary meaning unless they are technical words and phrases having a peculiar and appropriate meaning in the law requiring definition according to their technical import. In order to determine the plain and ordinary meaning of words, courts may properly consult English language dictionaries.

*Walling v. Appel Service Company, Inc.* 641 N.E.2d 647, 649 (Ind. App., 1994) [Citations omitted.] quoting *Ashlin Transportation Services., Inc. v. Indiana Unemployment Ins. Board*, 637 N.E.2d 162, 167 (Ind.App., 1994).

The term "information" is defined as a "(k)nowledge of specific events or situations that has been gathered or received by communication; intelligence or news." AMERICAN HERITAGE DICTIONARY ON-LINE (4TH EDITION.) "Knowledge" is defined as "the act of informing or the condition of being informed; communication of knowledge" and as "(s)pecific information about something." Id. Applying these definitions, the Court was obligated, upon receiving your request for personnel file records to provide you with specific information concerning any pending disciplinary actions or final action that led to discipline or discharge of an employee.

As stated above, I agree with Mr. Posey that it was not a violation of the APRA for the Court to refuse to produce actual copies of the personnel file records to you upon request. It is my opinion, however, that the Court was still required to supply you with specific information concerning the status of pending formal charges against an employee or final disciplinary action taken so that you could be adequately informed. At a minimum, in order to inform a requestor concerning pending formal charges or final disciplinary action under the APRA, the public agency should supply, the extent applicable, the following information:

#### Pending Formal Charges

IC 5-14-3-4(b)(8)(B)

- The status of any formal charges against the employee (i.e. date of formal charges and timeline for hearing or consideration);
- A description of the formal charges (i.e. violation of specific personnel rules or codes of conduct); and
- Any interim discipline lodged (i.e. administrative leave pending final action, etc.)

#### Final Disciplinary Action

IC 5-14-3-4(b)(8)(C)

- Type of discipline lodged against the employee (i.e. suspension, probation, reprimand,

- discharge, etc.)
- When the discipline was lodged, including time period for discipline such as a suspension or probation.
  - Why the discipline was lodged (i.e. description of conduct and whether it was a violation of personnel rules or another code of conduct, etc.)

In order to comply with the APRA, I consider the above information to be the minimum information necessary to fully inform someone of the nature of any pending formal charges or disciplinary action in question. A public agency certainly has discretion to supply more information to a requestor.

You pointed to at least one example in your complaint in which you were not supplied with enough information concerning disciplinary action taken against a particular WYC employee. I suggest that to the extent this was not done with respect to any of the personnel files you requested, the Court supplement its response and provide that information to you.

### CONCLUSION

It is my opinion that the Allen Superior Court has discretion over the disclosure of personnel file records under Indiana Code section 5-14-3-4(b)(8) so the failure to provide actual copies of personnel file records to you did not violate the APRA. The Court was required to provide you with specific information under Indiana Code sections 5-14-3-4(b)(8)(A-C) and to the extent this was done in response to your request, the Court did not violate the APRA. I recommend that the Court review the information provided, especially with respect to pending formal charges for final disciplinary action to ensure that adequate information has been provided to comply with the APRA for each of the Wood Youth Center employees for whom you requested such information.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: James Posey, Attorney for the Allen Superior Court

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<sup>1</sup> The standard on judicial review for records claimed to be subject to one of the discretionary exceptions under IC 5-14-3-4(b) is whether the plaintiff can show that the agency acted arbitrarily or capriciously in the exercise of the discretion. See IC 5-14-3-9(f).

<sup>2</sup> If a public agency were to provide copies of the actual personnel file records, the agency may redact or separate nondisclosable information from the disclosable information in those records. In many instances, the result would most likely be no more than the person has been provided in summary or digest form from the public agency.